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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 UNITED STATES OF AMERICA,)

8 Plaintiff,)

9 vs.)

10 CARL CHESTER,)

11 Defendant.)
_____)

2:06-cr-00309-RCJ-PAL-1

ORDER

12 In December 2007, a jury convicted Defendant Carl Chester of three counts of possession
13 of a controlled substance with intent to distribute. The Court sentenced Defendant to 264 months
14 of imprisonment, to be followed by five years of supervised release. Defendant appealed, and the
15 Court of Appeals affirmed in March 2009. Defendant later successfully moved in state court to
16 have a state criminal judgment against him amended. Defendant then filed a habeas corpus
17 motion in this Court under 28 U.S.C. § 2255, arguing, *inter alia*, that he should be resentenced
18 because the original sentencing was based on a career offender finding that could not be
19 supported in light of the correction to the state court judgment. In October 2011, the Court
20 granted the motion as to resentencing but denied the motion as to the claims of ineffective
21 assistance of counsel and prosecutorial misconduct. In March 2012, the Court resentenced
22 Defendant to 168 months of imprisonment, to be followed by five years of supervised release.
23 Defendant appealed, and the Court of Appeals affirmed in August 2013.

24 Defendant filed a second § 2255 motion. The Court denied the motion, stating that
25 Defendant would have to petition the Court of Appeals for permission to file a successive motion

1 under § 2255. *See* 28 U.S.C. § 2255(h). Defendant filed a motion to reconsider, noting that a
2 § 2254 motion is not “second or successive” under the statute if an amended judgment and
3 sentencing has intervened since the first motion was adjudicated. *See Wentzell v. Neven*, 674 F.3d
4 1124, 1127 (9th Cir. 2012). The Court, assuming *arguendo* that the Court of Appeals would read
5 “second or successive” under § 2255(h) to mean the same thing as it does under § 2244(b),
6 declined to reconsider, denying the arguments on the merits.

7 Defendant also asked the Court to issue a certificate of appealability, sanction the United
8 States, enter default judgment in his favor, hold an evidentiary hearing, release him or transfer
9 him to a facility closer to Las Vegas in anticipation of an evidentiary hearing, and appoint
10 counsel. The Court denied those motions. The Court of Appeals denied a motion for a
11 certificate of appealability. Defendant filed several more motions asking the Court to reconsider
12 and reassign the case to a new judge. The Court denied those motions. Defendant later filed
13 several more motions for appointment of the Federal Public Defender that the Court had
14 permitted to withdraw due to a conflict of interest, for reassignment to a new judge, and to order
15 a settlement of Defendant’s appeal. The Court denied the motions. Defendant later asked the
16 Court to issue a certificate of appealability as to the order denying those motions. The Court
17 denied the motion. The Court also denied a motion titled “Motion of Actual Innocence and
18 Unlawful Incarceration.”

19 Defendant later asked the Court to reconsider its April 17, 2014 order denying his second
20 § 2255 motion based on the state court having corrected certain records. The Court denied the
21 motion. Defendant later asked the Court to correct the presentence investigation report and to
22 reconsider its denial of his previous § 2255 motion. Defendant argued that the prior offenses
23 recounted, *supra*, were part of the same charging instrument because they were resolved via the
24 same plea agreement and judgment. The Court denied the motion. Defendant later asked the
25 Court to correct the Judgment due to the alleged unconstitutionality of one of the conditions of

1 supervised release and also due to its failure to identify the precise number of days credit for time
2 served, as reflected in the presentence investigation report. The Court denied the motion as a
3 successive motion under § 2255. *See* 28 U.S.C. § 2255(h). The Court and the Court of Appeals
4 denied a certificate of appealability.

5 Defendant later asked the Court to reduce his sentence under Amendment 782 to the
6 Guidelines. He noted that in March 2012 he was resentenced to 168 months, the low end of the
7 Guidelines range of 168–210 months, pursuant to a total offense level of 30 and a criminal
8 history category of VI. He argued that under the retroactively applicable Guidelines, he would be
9 subject to a range of 140–175 months, because his total offense level for the amount of drugs at
10 issue would be 28. He therefore requested resentencing at the low end of the recalculated
11 Guidelines range, i.e., 140 months. The Government argued that the Court did not have
12 jurisdiction to consider the motion due to a pending appeal as to the sentence. In reply,
13 Defendant argued that the motion did not implicate any issues before the Court of Appeals. The
14 Court noted that the only issue certified for appeal was “whether appellate counsel rendered
15 ineffective assistance by failing to argue that the Fair Sentencing Act applied at the 2012
16 resentencing, including whether appellant is entitled to a reduced term of supervised release, or
17 reclassification of his convictions.” A determination of the Amendment 782 issue was not
18 certified for appeal and was therefore not “involved in the appeal.” *See Griggs v. Provident*
19 *Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Defendant noted that amending a judgment
20 pursuant to Amendment 782 would not require a resentencing hearing or even a new presentence
21 investigation report, and that Defendant could not bring the motion via habeas corpus motion
22 under 28 U.S.C. § 2255, but only via 18 U.S.C. § 3582(c)(2). He argued that awaiting the
23 mandate from the pending appeal could prejudice him, because if the Court were to grant the
24 motion and resentence him to the low end of 140 months, he would be entitled to immediate
25 release.

1 The Court found that Defendant potentially qualified for a retroactive two-point
2 reduction. As he noted, he was sentenced based on 166.4 grams of cocaine base, giving a base
3 offense level of 28. (*See* Resentencing Tr. 13:23–14:3, ECF No. 220). The base offense level for
4 that amount under Amendment 782 is indeed 26. *See* U.S.S.G. § 2D1.1(c)(7) (2014). His total
5 offense level would then be 28. Combined with a criminal history category of VI, he would
6 indeed face a Guideline range of 140–175 months. The Court, however, found that considering
7 the § 3553(a) factors, a term of 168 months was still appropriate. As the Court had previously
8 noted after thorough discussion, 168 months was a sufficient sentence, but the Court could not in
9 good conscience sentence Defendant below that term. (*See* Resentencing Tr. 33–42). As to the
10 policy statement in § 1B1.10, Defendant did not argue how any of the Court’s statements in
11 justifying the sentence imposed at the 2012 resentencing hearing under § 3553(a) were no longer
12 valid. The Court also found that public safety still favored the current sentence. As noted at the
13 2012 hearing, the Court believed the 168-month sentence was necessary to ensure the
14 rehabilitation of Defendant, who, although redeemable and who appeared to be working towards
15 rehabilitation, had an extensive criminal history. Finally, Defendant did not adduce any evidence
16 of post-sentencing conduct that would mitigate in favor of a reduction and in fact appeared not to
17 desire that a new presentence investigation report be prepared. The Court denied a motion to
18 reconsider.

19 Defendant has now asked the Court to recommend twelve months confinement in a
20 residential reentry center (“RRC”), to include six months of home confinement, upon his release.
21 Rule 35 permits a court to correct mathematical, technical, or clear errors in a criminal judgment
22 within fourteen days of sentencing, and Rule 36 permits a court to correct clerical errors or errors
23 resulting from oversights or omissions at any time. *United States v. Cardona*, No. 3:09-cr-49,
24 2009 WL 3254477, at *1 (D. Conn. Oct. 6, 2009) (citing Fed. R. Crim P. 35, 36). Where, as
25 here, there is no error to correct, there is no mechanism for a court to simply amend the judgment

1 in order to add something to it. Although the Court may not amend the Judgment to make the
2 requested recommendation, it may make the recommendation via the present order. *See id.*

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the Motion Requesting Judicial Recommendation (ECF
5 No. 394) is GRANTED IN PART and DENIED IN PART. The Court may not amend the
6 Judgment. However,

7 IT IS HEREBY RECOMMENDED that to the extent permitted by law and regulation the
8 Bureau of Prisons shall consider placing Carl Chester in a Residential Reentry Center near his
9 children during the last twelve months of his sentence, with the final six months to be spent in
10 home confinement.

11 IT IS SO ORDERED.

12 Dated this *7th day of August, 2018.*

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16 ROBERT C. JONES
17 United States District Judge
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